IN THE
TENTH COURT OF APPEALS

No. 10-19-00240-CR

JOSHUA MICHAEL WEBB,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 278th District Court
Walker County, Texas
Trial Court No. 28945

MEMORANDUM OPINION

In three issues, appellant, Joshua Michael Webb, challenges his conviction for aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. § 22.021 (West 2019). We affirm.

I. MOTION TO SUPPRESS

In his first two issues, Webb contends that the trial court erred by denying his motion to suppress an oral confession he made during questioning by law enforcement.

Webb asserts that his confession should have been suppressed under the Fifth Amendment to the United States Constitution and under article 38.22 of the Code of Criminal Procedure because a reasonable person would not have believed that they were free to leave, and because Webb was not read his *Miranda* rights prior to offering his confession. *See* U.S. CONST. amend V; *see also* TEX. CODE CRIM. PROC. ANN. art. 38.22 (West 2018). We disagree.

A. Standard of Review

A trial court's denial of a motion to suppress is reviewed for an abuse of discretion. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We review the evidence in the light most favorable to the trial court's ruling, *see Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007), and we review the trial court's ruling under a bifurcated standard of review, giving almost total deference to the trial court's rulings on (1) questions of historical fact, even if the trial court's determination of those facts was not based on the evaluation of credibility and demeanor, and (2) application-of-the-law-to-fact questions that turn on the evaluation of credibility and demeanor. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). However, when application-of-the-law-to-the-fact questions do not turn on credibility and demeanor of the witnesses, we review the trial court's ruling on those questions de novo. *Id.* Furthermore, we review the record to determine whether the trial court's ruling is supported by the record and correct under some theory

of law applicable to the case. *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003).

B. Applicable Law

Oral confessions of guilt or oral admissions against interest made by a suspect who is in custody are not admissible unless made in compliance with the provisions of article 38.22 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22; *see also Shiflet v. State*, 732 S.W.2d 622, 623 (Tex. Crim. App. 1985). However, if a person makes an oral confession of guilt or an oral admission against interest while not in custody, a different rule applies. *See Shiflet*, 732 S.W.2d at 623. Article 38.22, section 5 provides that: "Nothing in this article precludes the admission of a statement made by the accused . . . that does not stem from custodial interrogation . . . ." TEX. CODE CRIM. PROC. ANN. art. 38.22, § 5. Thus, an oral confession or an oral admission against interest that does not stem from custodial interrogation, and is given freely, voluntarily, and without compulsion or persuasion, is admissible evidence against the accused. *See Shiflet*, 732 S.W.2d at 623. Further, *Miranda* warnings are required only when the questioning by police stems from custodial interrogation. *See Dowthitt v. State*, 931 S.W.2d 244, 263 (Tex. Crim. App. 1996).

Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed.

2d 694 (1966). A person is in "custody" only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree that he was not at liberty to leave. *See Dowthitt*, 931 S.W.2d at 254 (citing *Stansbury v. California*, 511 U.S. 318, 323-25, 114 S. Ct. 1526, 1529-30, 128 L. Ed. 2d 293 (1994)); *see also Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). The determination of "custody" must be made on an ad hoc basis after considering all of the objective circumstances. *Herrera*, 241 S.W.3d at 526.

At least four general situations may constitute "custody": (1) the suspect is physically deprived of his freedom of action in any significant way; (2) a law enforcement officer tells the suspect that he cannot leave; (3) law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and (4) there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave. *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009). In all four circumstances, the initial determination of "custody" depends on the objective circumstances of the interrogation, not on the subjective views of the interrogating officer or the person being questioned. *Dowthitt*, 931 S.W.2d at 255. In any event, in the first three circumstances, the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention. *Id.* Regarding the fourth circumstance, the officers' knowledge of probable cause must "be manifested to the suspect" to constitute "custody." *Id.*

Moreover, in determining whether an encounter amounts to an arrest or an investigative detention, the Court of Criminal Appeals has listed the following factors to consider: (1) the amount of force displayed; (2) the duration of the detention; (3) the efficiency of the investigative process and whether it is conducted at the original location or whether the person is transported to another location; (4) "the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation"; and (5) any other relevant factors. *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008).

A trial judge's ultimate "custody" determination "presents a mixed question of law and fact." *Herrera*, 241 S.W.3d at 526 (citing *Thompson v. Keohane*, 516 U.S. 99, 112-13, 116 S. Ct. 457, 465-66, 133 L. Ed. 2d 383 (1995)). We afford almost total deference to a trial judge's "custody" determination when the questions of historical fact turn on credibility and demeanor; otherwise, we review the trial judge's "custody" determination de novo. *Id.*

C. Discussion

In the instant case, Thomas Bean, a detective with the Walker County Sheriff's Office, testified that he met with Webb twice at the Sheriff's Office. Detective Bean recounted that Amanda Mernaugh, Webb's mother, transported Webb, who was eighteen years old at the time, to the Sheriff's Office on both occasions. At the first meeting, Detective Bean introduced himself to Webb, gathered personal information

from Webb, and informed Webb that "he was free to leave, that the door was unlocked, and that he was here voluntarily. . . ." Detective Bean attempted to record the interview; however, he was unable to recover the video from the interview due to a malfunction with the hard drive on camera.[1]

Thereafter, Detective Bean called Webb and arranged for a second interview about a week later. At the beginning of the second interview, Detective Bean once again informed Webb that he was free to leave at any time; that the door was unlocked; and that he was there voluntarily. In his testimony, Detective Bean recalled the following from the second interview:

> I explained to Mr. Webb—well, first off, I thanked him for coming in, told him that he was free to leave, and I explained to him that I had completed my investigation, and during that investigation[,] I had found the video from him purchasing the pregnancy test, and then we observed the video of the forensic interview, and I explained to him about the pregnancy test, and I asked him why he didn't explain—why he said he didn't do that in the previous interview, and he said that he had purchased it for his mom. I asked him why he didn't tell me in the previous interview, and he told me that it was her business. I then explained to him about the forensic interview and all of the stuff that the victim had explained to us about how he had taught her how to give a hand job and a blow job while she was on her period, because she couldn't have sex, and I told him that it was going to go to the District Attorney's office next, and that I just needed to hear his side of the story to find out exactly what was going on, and I wanted him to be truthful with me, to tell me what was going on. At that point[,] he told me that they did it. I stopped and I asked him what they did, and he told me that they had sex. He proceeded to go on and talk about how it was a mistake, and I stopped him, and I, at that point, read him his [*Miranda*] rights.

[1] Following a hearing outside the jury's presence, the trial court excluded any evidence of this initial interview.

Webb then requested an attorney, and Detective Bean stopped the interview and placed Webb under arrest based on his confession that he had had sex with a thirteen-year-old girl. It is the trial court's admission of the statement made during this second interview that is the basis of Webb's complaints in the first two issues.

Based on our review of the record, we cannot say that, at the time of Webb's confession, a reasonable person would have believed that Webb was under restraint to the degree associated with an arrest. *See Wilson v. State*, 442 S.W.3d 779, 784-87 (Tex. App.—Fort Worth 2014, pet. ref'd). Our conclusion is premised on the following facts: (1) Webb, an eighteen-year-old adult, voluntarily came to the Sheriff's Office twice for interviews and was not transported there by law enforcement[2]; (2) Detective Bean specifically mentioned to Webb that he was free to leave, that the door was unlocked, and that he was there voluntarily; (3) Detective Bean informed Webb that he only wanted to get Webb's side of the story; (4) the encounter lasted only a few minutes before Webb offered his confession; and (5) Webb had freedom of movement because Detective Bean did not handcuff or use force on Webb during questioning. *See Colvin v. State*, 467 S.W.3d 647, 655 (Tex. App.—Texarkana 2015, pet. ref'd) (concluding that the trial court not abuse

[2] The fact that Webb's mother drove Webb to the Sheriff's Office is of no consequence to our analysis. Webb does not direct us to any authority holding that the presence of one's mother somehow transforms a voluntary encounter between a suspect and law enforcement into a custodial interrogation. Rather, based on the totality of the circumstances, the record demonstrates that Webb's participation in the two interviews was voluntary. *See, e.g.*, TEX. PENAL CODE ANN. § 8.07(b) (West Supp. 2019) (noting that a person is considered an adult at age seventeen for the purpose of criminal responsibility).

its discretion by admitting Colvin's unwarned confession where the record showed that the statements were not the product of custodial interrogation given that, among other things, Colvin agreed to speak with law enforcement and drove himself to the interview; the interviewing officer told Colvin that he was not being held and that he was not under arrest; and Colvin was not searched or handcuffed and had freedom of movement); *see also Garcia v. State*, 106 S.W.3d 854, 858 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding that no reasonable person would have believed that Garcia was restrained to the degree associated with a formal arrest when the record showed that Garcia and his girlfriend voluntarily came to the police department; the interviewing officer informed Garcia that he was free to leave, that he was there voluntarily, and that he could talk about the incident if he chose to do so; the interviewing officer was not armed; and there was no evidence that Garcia was coerced or forced into making a statement). Therefore, viewing the evidence in the light most favorable to the trial court's ruling, we conclude that Webb's confession was not the product of a custodial interrogation for which *Miranda* warnings were required. *See Gardner*, 306 S.W.3d at 294; *Sheppard*, 271 S.W.3d at 291; *Dowthitt*, 931 S.W.2d at 255, 263. Accordingly, we cannot say that the trial court abused its discretion by denying Webb's motion to suppress.[3] *See Guzman*, 955 S.W.2d at 89. We overrule Webb's first two issues.

[3] In his brief, Webb mentioned the issue of "piggybacking," which involves a situation where law enforcement obtains incriminating evidence during a custodial interrogation of an individual without first providing *Miranda* warnings and then re-obtains the same information after providing *Miranda* warnings.

II. THE STATE'S QUESTIONING OF A PUNISHMENT WITNESS

In his third issue, Webb argues that the trial court erred by permitting the State to continue questioning a witness during the punishment phase of trial after that witness invoked her Fifth Amendment privilege against self-incrimination.

At the punishment phase of trial, Webb called Mernaugh as a witness. During cross-examination, the State questioned Mernaugh about nude photographs of the child victim in this case that were allegedly sent to Webb. At the outset of this questioning, Webb objected that this "line of questioning may cause [Mernaugh] to invoke the Fifth Amendment . . . ." In response, the trial court provided the following instructions:

> Ma'am, you have a Constitutional right to claim the Fifth Amendment on any questions you think might tend to incriminate you. You have to invoke that right when the question is asked though. If you invoke that right, I'll honor that request and make her move on to the next question. If you feel comfortable in answering the question, you can do that, but [defense counsel] cannot invoke the Fifth Amendment for you, and I would not allow him to do that, but if you think that you're going to give testimony that may make you look guilty of some crime, you can claim the Fifth Amendment privilege, and I'll honor that request. Do you understand that?

When Mernaugh expressed confusion, the trial court clarified:

> Okay, I didn't figure you would. All right, if somebody asks you something, and you think it might expose you to criminal prosecution or a charge of some sort, you're not required to answer that question under oath at this time.

See Missouri v. Seibert, 542 U.S. 600, 611-17, 124 S. Ct. 2601, 2609-13, 159 L. Ed. 2d 643 (2004). The issue of "piggybacking" is not relevant in this case because, as we have concluded, Webb's confession was not the product of a custodial interrogation. Furthermore, the record indicates that after Detective Bean read Webb his *Miranda* rights, Webb invoked his right to counsel and the interview ended.

Mernaugh then invoked her Fifth Amendment privilege against self-incrimination.

Despite the invocation of the Fifth Amendment, the State asked: "Okay, his response to that, which in no way implicates this witness, was 'I don't know, Mom. The messages were deleted.' Was it not?" Mernaugh responded, "I'm not—," and the State interrupted with a different line of questioning pertaining to a pregnancy test that Webb bought and told police was for Mernaugh.

On appeal, Webb complains that the trial court should not have permitted the State to continue to question Mernaugh regarding the alleged nude photographs of the child victim once Mernaugh invoked the Fifth Amendment. However, as shown above, Webb did not object in the trial court on this ground. Webb's only "objection" to this line of questioning was really his initial attempt to invoke the Fifth Amendment on behalf of Mernaugh.

To preserve error for appellate review, a complaining party must make a timely and specific objection. *See* TEX. R. APP. P. 33.1(a)(1); *see also Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Because Webb did not object to the State's subsequent question about the nude photographs of the child victim after the Fifth Amendment was invoked, we conclude that Webb failed to preserve this issue for appellate review. *See* TEX. R. APP. P. 33.1(a)(1); *see also Wilson*, 71 S.W.3d at 349.

Furthermore, to the extent that Webb contends that his "objection" to the State's line of questioning about the purported nude photographs of the child victim somehow

preserved error, we note that points of error on appeal must correspond or comport with objections and arguments made at trial. *Dixon v. State*, 2 S.W.3d 263, 273 (Tex. Crim. App. 1998); *see Wright v. State*, 154 S.W.3d 235, 241 (Tex. App.—Texarkana 2005, pet. ref'd). "Where a trial objection does not comport with the issue raised on appeal, the appellate has preserved nothing for review." *Wright*, 151 S.W.3d at 241; *see Resendiz v. State*, 112 S.W.3d 541, 547 (Tex. Crim. App. 2003) (holding that an issue was not preserved for appellate review because appellant's trial objection did not comport with the issue he raised on appeal). Because Webb's "objection" was merely an attempt to invoke the Fifth Amendment on behalf of Mernaugh, we cannot say that his "objection" comports with the argument he makes on appeal. Therefore, based on the foregoing, we conclude that this issue was not preserved for appellate review. *See* TEX. R. APP. P. 33.1(a)(1); *see also Resendiz*, 112 S.W.3d at 547; *Wilson*, 71 S.W.3d at 349; *Dixon*, 2 S.W.3d at 273; *Wright*, 154 S.W.3d at 241. Accordingly, we overrule Webb's third issue.

III. CONCLUSION

Having overruled all of Webb's issues on appeal, we affirm the judgment of the trial court.

JOHN E. NEILL
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed August 5, 2020
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